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NO. 77-259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

FLR CORPORATION, *Appellant*

v.

BILL BLODGETT, ET AL, *Appellee*

Appeal From The Supreme Court Of The State Of Texas

JURISDICTIONAL STATEMENT

SAMUEL INTRATER
BRICK & INTRATER
1025 Vermont Avenue, N.W.
Washington, D. C.
(202) 347-6943

Of Counsel:

WENDELL S. LOOMIS
1012 Esperson Building
808 Travis
Houston, Texas 77002
(713) 225-0761

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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NO. _____

IN THE

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OCTOBER TERM, 1977

FLR CORPORATION, *Appellant*

v.

BILL BLODGETT, ET AL, *Appellee*

Appeal From The Supreme Court Of The State Of Texas

JURISDICTIONAL STATEMENT

Appellant's appeal from the judgment of the Court of Civil Appeals for the Eighth Supreme Judicial District of the State of Texas entered on August 18, 1976, and the judgment of the Supreme Court of Texas refusing Appellant's application for Writ of Error declaring "no reversible error" and the overruling of Appellant's Motion for Rehearing by the Supreme Court of Texas, June 8, 1977 and submit this statement to show that the Supreme Court of the United States has jurisdiction of the Appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas is reported in 541 S.W.2d 209 and is attached as Appendix A. The denial of the Writ of Error by the Supreme Court of Texas is not reported, no opinion having been written. The orders of the Supreme Court of Texas, denying the Writ of Error declaring no reversible error and overruling Motion for Rehearing, are attached as Appendix B. Notice of appeal was filed in the Court of Civil Appeals, the Court possessed of the record, on June 17, 1977, and is attached as Appendix C.

JURISDICTION

The jurisdiction of the Supreme Court to review this decision is conferred by *Title 28, U.S. Code § 1257 (2).*

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case:

Armstrong v. Manzo, et ux, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965) and *Brinkerhoff-Faris Trust and Savings Co. v. Hill,* 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930).

QUESTIONS PRESENTED

Whether the District Court of Texas, by dissolving a Temporary Restraining Order of unquestioned validity, without notice or hearing (except later by telephone conference) and directly ordering the foreclosure sale of real estate, deprived Appellant of its property without due process of law contrary to the Fourteenth Amend-

ment of the Constitution of the United States; and whether that portion of *Rule 680, Texas Rules of Civil Procedure* as interpreted by the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas and the Supreme Court of Texas is in conflict with the Due Process and Equal Protection clauses of the Fourteenth Amendment of the Constitution of the United States

STATUTES INVOLVED

Rule 680, Texas Rules of Civil Procedure (Appendix D)

Art. 3810, Vernon's Annotated Civil Statutes of Texas (Appendix E)

STATEMENT

This case began by the filing of a Temporary Restraining Order (Appendix F) by Judge A. P. Allison of the 198th Judicial District Court in Bandera County, Texas, pursuant to *Rule 680, TRCP.* The Temporary Restraining Order was in proper form, was supported by the required bond, and was properly served upon the Defendants, Bill Blodgett, Trustee, and the Texas Real Estate Investment Trust, Appellees here. It temporarily enjoined and restrained, for 10 days, the Trustee from conducting a foreclosure sale and provided for a court hearing within those ten days to consider dissolving the restraint or continuing it as a temporary injunction ***pendente lite.***

The same day of the filing and service of the Temporary Restraining Order, on the oral urging of Counsel for the Defendants, the Court authorized the Trustee to start reading the Notice of Sale for foreclosure and

advised Plaintiff's (Appellant's) Counsel of a hearing to be held that same afternoon in Brady, Texas, where the Court was setting at the time, a place 125 miles (approximately) away from Bandera, Texas, where Plaintiff's representatives were located and 250 miles away from the office of Plaintiff's Counsel to which office Plaintiff's Counsel had returned after the filing of the Temporary Restraining Order with the Clerk of the Court in Bandera County, Texas. The distances involved precluded Plaintiff's Counsel and Plaintiff's representatives from being present before the Court.

Over the objection of the Plaintiff, the Court conducted a so called "telephone hearing", which was not preceded by any written application therefor. The Court considered written evidence submitted to it without the knowledge of the Plaintiff or Plaintiff's Counsel. During said "telephone hearing", the Court heard only oral argument. The Court concluded the "telephone hearing" by announcing, at 3:45 p.m., that the Temporary Restraining Order was dissolved and hanging up the telephone.

Subsequently, FLR Corporation, Appellant, filed a Petition for Chapter XI Proceeding In An Arrangement in the Bankruptcy Court for the Western District of Texas, San Antonio Division, and being authorized to do so by the Bankruptcy Judge, continued to prosecute the instant case to trial. Judgment, after jury verdict, was entered that the sale and Trustee's Deed was valid and effective to convey title to the property to Texas First Mortgage Real Estate Investment Trust, Appellee.

The controlling point in the case on trial was, in the final analysis, the validity of the sale by the Trustee, Bill Blodgett, of the real property of Appellant, variously

estimated in value in excess of $3,000,000.00 up to $8,000,000.00 for $950,000.00 to Appellee, Texas First Mortgage Real Estate Investment Trust.

Appellant, as the result of the action of the Court in ordering and taking charge of the foreclosure proceeding, was divested, by direct action of the Court, of its assets and thereby deprived of its property without due process of law.

This due process question was raised and presented in the Trial Court by argument, and in the Court of Civil Appeals for the Eighth Supreme Judicial District and in Appellant's Application for Writ of Error to the Supreme Court of Texas and in Appellant's Motion for Rehearing to the Supreme Court of the State of Texas. The question was raised in the Trial Court by protest that the action of the Trial Court in dissolving the Temporary Restraining Order was without notice, without adequate notice, without application being filed therefor and without adequate hearing thereon. The question was raised in Appellant's brief to the Court of Civil Appeals for the Eighth Supreme Judicial District as Point of Error Number Two which reads as follows:

II. THE TRIAL COURT ERRED IN GRANTING A JUDGMENT TO APPELLEE BECAUSE THE UNDISPUTED FACTS SHOW THE TRUSTEE'S SALE WAS INVALID

The question was further raised in the REPLY BRIEF FOR APPELLANT in the Court of Civil Appeals for the Eighth Supreme Judicial District where the Point of Error above cited, was restated and further briefed. It was

raised in Appellant's APPLICATION FOR WRIT OF ERROR in the Supreme Court of the State of Texas as Appellant's Fourteenth Point of Error which reads as follows:

FOURTEENTH POINT OF ERROR

THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT THE FACTS SURROUNDING AND LEADING UP TO JUDGE ALLISON'S ORDER DISSOLVING THE TEMPORARY RESTRAINING ORDER DID NOT VIOLATE THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND AMENDMENTS THERETO AND THE CIVIL RIGHTS ACT OF THE CONGRESS OF THE UNITED STATES, *42 USCA, §1983.*

The question was finally raised in APPELLANT'S MOTION FOR REHEARING ON APPLICATION FOR WRIT OF ERROR in the SUPREME COURT OF TEXAS wherein said FOURTEENTH POINT OF ERROR was restated and further briefed.

The question of the validity of the Trustee's Sale is controlling of the outcome of the case for the reasons the possession of the property was forceably taken without the consent of Appellant shortly after said sale and the Defendant, being thereby deprived of its single major asset, was unable to continue its business and sought the protection of the Bankruptcy Court in a Proceeding In An Arrangement for the benefit of and protection from its numerous creditors. Were the sale to be held invalid, title

and possession of the property in question would come under the jurisdiction of the Bankruptcy Court and proceedings for the disposition thereof or rehabilitation of the debtor and dividends to its many creditors, would proceed in due course.

The opinion of the Court of Civil Appeals was that because of the Trustee's Deed, your Appellant parted with its title to the property and therefor could not prevail.

Further, the Court of Civil Appeals held that the Appellant had lost possession of the real property in question and therefor, not having such possession, could not prevail in its Trespass to Try Title suit under existing Texas Law.

The questions raised herein are "fundamental error" under Texas Law which is interpreted by the Courts of the State of Texas as questions and issues that can be raised at any time during the proceeding or by the Court itself.

Ramsey v. Dunlop, 164 Tex. 196, 205 S.W.2d 979;
Texas and Pacific Coal Company v. Lawson, 89 Tex. 494, 32 S.W. 871;
3 Tex. Jur. 2d (§102, p. 430)

The Court of Civil Appeals, in its opinion, did not write on the questions here presented, although they were properly presented to it in Appellant's briefs. Such questions constitute "fundamental error".

The Supreme Court denied Appellant's Application for Writ of Error finding "no reversible error" and did not write an opinion.

THE QUESTIONS ARE SUBSTANTIAL

The issues involved in this Appeal are similar to those raised by *Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) and *Sniadach v. Family Finance Company,* 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 249 (1969) wherein this Court clearly distinguished private action as authorized by the laws of a state and *judicial* state action which was repugnant to the Fourteenth Amendment to the Constitution of the United States. It is submitted that Appellant has had its property taken from it by the express order of a District Judge of the State of Texas acting under color of his authority as a District Judge without due process of law and without equal protection of the laws. A State Official, having previously issued a Temporary Restraining Order within his authority and valid on its face and of unquestioned import, without prior notice or any notice, in fact, ordered and authorized a private citizen, the substitute Trustee, Bill Blodgett, to violate the face of that order by commencing a substitute Trustee's sale of the valuable property belonging to the Appellant. Shortly thereafter, without any written or sworn motion or application for the dissolution thereof, that Judge received evidence from the Appellee without the knowledge of the Appellant and without the Appellant's ability to examine and cross-examine that evidence. The Court then held a "telephone hearing" and concluded the hearing by the simple expediency of hanging up, while Appellant was in mid-argument.

In *Leisure States of America, Incorporated v. Carmel Development, Et Al,* 371 Fed. Sup. 556, and *Hoffman v. United States Department of HUD, Et Al,* 371 Fed. Sup.

576, the Courts held that the mere holder of a Deed of Trust acting pursuant to contract provisions contained in the Deed *did not* become a representative of the State or political subdivision by posting notices and holding foreclosure proceedings as permitted by §3810, *Vernon's Annotated Civil Statutes,* and therefore did not violate Amendment Fourteen of the Constitution of the United States of America and the CIVIL RIGHTS ACT, 42 USCA §1983. By dictum they did conclude however, that should there have been a state involvement such as an agency or official, such a fact situation might bring the cases within the ban of the Fourteenth Amendment of the Constitution of the United States.

In *Adams v. Southern California First National Bank,* C.A. Cal., 1973, 492 Fed.2d 324, certiorari denied, 95 S.Ct. 325, 419 U.S. 106, 42 L.Ed.2d 282, the Court, in ruling on the question of repossession of secured property, states words to the effect that the support by the State of private conduct must be significant to come within the Civil Rights Act.

Another case points out that there may be a finding of "State action or action under color of State law" within the meaning of the CIVIL RIGHTS ACT when a private party's action occurred with the affirmative orders or specific approval of a State Agency. *Jackson v. Metropolitan Edison Company,* C.A. Pa. 1973, 483 Fed.2d 754, affirmed 95 S.Ct. 449, 419 U.S. 345, 42 L.Ed.2d 477.

Under the Texas deed of trust scheme, legal title to real property which is to be security for a debt, is placed in the name of a "Trustee". Upon default in payment the creditor can order the "Trustee", or his substitute, to

post notices and sell the property on the first Tuesday of the month between the hours of 10 A.M. and 4 P.M. The creditor can and usually does bid for the property. Frequently he is the only bidder and his bid is grossly inadequate.

In the event of a dispute between the creditor and the debtor as to payment or creditor's right to payment (as in this case) the debtor's only recourse is the filing of suit and, if foreclosure by Trustee's Sale is threatened, obtaining a temporary restraining order and executing a bond payable to the creditor. Within 10 days the court must conduct a hearing and, on showing of probable cause, may continue the restraint as a temporary injunction, *pendente lite*. Rule 680, T.R.C.P., *supra*.

There is no "equity of redemption" in Texas under the deed of trust scheme. The sale by the Trustee is final and divests the debtor of his property fully and finally. The bidder at the sale must produce cash or credit acceptable to the creditor. The creditor, however, as a bidder may offset the debt against his bid. When dealing with $950,000.00 or property worth in excess of $3,000,000.00 the difficulties of producing the bid in cash at the Courthouse steps of the small community of Bandera, are readily apparent.

In the instant case, Appellee agreed to loan Appellant $3,000,000.00 on the security of the property to be used for various improvements to be constructed. A dispute arose as to the quantity and quality, and therefore costs, of the improvements and Appellee, creditor, withheld $800,000 of the loan, and therefore some of the improvements could not be made as promised to prospective purchasers of lots in the subdivision. Sales of lots declined

and debtor ran into financial trouble. Although debtor hypothecated some of its contracts for sale and repaid $847,000 of the loan, creditor was unyielding in its refusal to move forward with the project and its prior commitment. While still talking settlement, creditor prepared to foreclose on the first Tuesday of the month, June 4, 1974.

Debtor, not having $1,200,000.00 in cash to pay the loan, its assets being tied up primarily in the real property, took the only course open to it under Texas law and properly applied for and obtained a restraining order. Nowhere in the case has this procedure, its propriety or legality been questioned. Creditor could, after the required hearing within the 10 days, if authorized by the Court to do so, renew its notices and foreclose on the first Tuesday of July, the next month, and recover its damages for the one month's delay out of debtor's bond. This is a time honored and well grooved procedure.

Debtor owned its primary title to its real estate subject only to its obligation to creditor, Appellee. When the negotiations broke down. Debtor had a right to apply to the Court to protect its title. The Court had discretion to issue or not to issue its restraining order. But, once issued, the Court no longer had the right to reverse itself and divest Debtor of those rights without a hearing.

In *Fuentes v. Shevin* (supra) this Court reaffirms *Boddie v. Connecticut*, 401 U.S. 371, 28 L.Ed.2d 113, 91 S.Ct. 780, "That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situ-

ations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Fuentes v. Shevin, supra,* at 406, 32 L.Ed.2d at 571.

In this case the deprivation of Appellant's property was not temporary, as in the other cases, but was absolutely final subject only to setting the sale aside by prevailing in this suit.

In *Armstrong v. Manzo, supra,* this Court specified that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner, at 552, 14 L.Ed.2d at 66.

Rule 680, T.R.C.P., is clear as written, and it is submitted, complies with every due process requirement. It is the interpretation placed on the last sentence by the Courts in this case with which Appellant quarrels. That last sentence reads as follows:

> "On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require."

Here the court has apparently interpreted the words "expeditiously as the ends of justice require" to mean no meaningful notice or meaningful opportunity to be heard. It is submitted that an hour or two of notice for a hearing 250 miles away or a telephone conference call with the Judge is not "meaningful". (Appellant has found no legal precedent for a "telephone hearing")

The "ends of justice" requirement for Appellee, as the creditor, could only mean loss of one month's interest, which loss, if it occurred, was adequately covered by Appellant's bond. It is submitted that the justice requirement was not so urgent as to justify depriving Appellant and its other creditors of due process and suspend the 14th Amendment.

CONCLUSION

This appeal raises a substantial question within procedural due process. The 14th Amendment not only applies to laws of the states, but also to how they are applied by the courts of those states. It involves substantial values in real property. It involves the interest of numerous unsecured creditors under the Bankruptcy Act.

Respectfully submitted,

SAMUEL INTRATER
BRICK & INTRATER
1025 Vermont Avenue, N.W.
Washington, D. C.
(202) 347-6943

Of Counsel:

WENDELL S. LOOMIS
1012 Esperson Building
808 Travis
Houston, Texas 77002
(713) 225-0761

September, 1977

APPENDIX A

Court Of Civil Appeals Opinion

Eighth Supreme Judicial District

El Paso, Texas, August 18, 1976

Hon. Wendell S. Loomis
Attorney at Law
Esperson Building, Suite 1012
808 Travis Street
Houston, Texas 77002

Sir:

You are hereby notified that, in the case of F L R CORPORATION, Appellant, v. BILL BLODGETT, TRUSTEE, and TEXAS FIRST MORTGAGE REIT, Appellees, our No. 6516, from Bandera County, the following decision and order was this day made and entered by the Court:

The Honorable Court of Civil Appeals today rendered judgment affirming the judgment of the trial Court.

Respectfully yours,

Anne D. Ray, Clerk

No. 6516 — F L R Corporation v. Bill Blodgett, Trustee, and Texas First Mortgage REIT, from Bandera.

J U D G M E N T

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed; that the appellees, Bill Blodgett, Trustee, and Texas First Mortgage REIT, do have and recover of and from the appellant, F L R Corporation, and its surety, Lawyers Surety Corporation, all costs in this behalf incurred, and this decision be certified below for observance.

NO. 6516

F L R CORPORATION,
Appellant,

v.

BILL BLODGETT, TRUSTEE, and
TEXAS FIRST MORTGAGE REIT,
Appellees.

Appeal from the District Court of
Bandera County, Texas

O P I N I O N

The Appellant, F L R Corporation, presents this appeal from an adverse judgment in a trespass to try title action and suit over a trustee's deed and a cross claim for a declaratory judgment as to the validity of a trustee's deed following a foreclosure sale. We affirm.

In September, 1970, Mr. Richard Olivere obtained an option to buy the 541-acre Flying L Ranch near Bandera for $754,000.00, with a down payment of $50,-000.00 and the balance to be paid over six years. The sale was closed in June, 1971, and title was taken in F L R Corporation, a wholly owned subsidiary of 612 Corporation, in which Mr. Olivere was a stockholder and President at the time of the trial of this case. Most of the stockholders were New York investors. The property was described as a dude ranch with a landing strip, twelve cottages, a tack room, swimming pool and tennis courts at the time of the sale.

Mr. Olivere decided to fully develop the property by dividing it into lots for homesites, building the necessary

roads, adding a golf course, club house, riding stable and small lake. An additional 167 acres of adjoining land was purchased to use in the development. In order to obtain the necessary capital, F L R obtained a $3,-000,000.00 loan from Texas First Mortgage Real Estate Investment Trust (TFMR) on February 28, 1973. F L R executed a note and deed of trust along with an Assignment of Contract Rights and a Construction Loan Agreement. TFMR initially advanced $1,784,675.15 under the loan agreement. Additional advances increased the amount to $2,019,206.66. By making an assignment of Sales Contracts, F L R was able to obtain a loan in July, 1973, from FBS Financial for $1,105,000.00, of which $847,000.00 was paid on the note to TFMR. Shortly after development began, an energy crisis developed and inflation increased rapidly. The estimated cost of the planned club house went from $275,000.00 to $550,-000.00, and the cost of most of the other development plans increased in a like manner. TFMR refused to advance the funds for the club house because the contingency fund provided for in the loan was not sufficient to cover the cost increase, and the total projected development cost exceeded the available funds. With development stalled and problems in the national economy adversely affecting the land development market, F L R was in financial difficulty. Tax liens were filed on the ranch in the Spring of 1974. A number of property owners sued F L R when promised development was stopped. Defaults occurred under the deed of trust when lots were transferred without releases from TFMR and when second and third liens were placed on some of the land. The ranch operations were losing money each month, and it finally became necessary for TFMR to pay some monthly bills for operations to continue.

On May 13, 1974, TFMR posted notices for a trustee's sale on June 4, 1974. Late in the afternoon on June 3, 1974, F L R filed suit in Houston seeking a restraining order to enjoin the sale. Before the order was granted, counsel for TFMR appeared and requested a hearing. The district judge agreed to hear the matter the following morning. That evening, Mr. Olivere and his attorney flew to Brady and shortly after midnight, District Judge A. P. Allison granted a temporary restraining order. When counsel for TFMR arrived for the hearing in Houston on June 4, they were advised that F L R was taking a nonsuit. After learning of the order issued by Judge Allison, they requested a hearing which was set for that afternoon. While they were flying from Houston to Brady, counsel for F L R was flying back to Houston, unaware of the hearing scheduled for later in the day. At about 3:15 p.m., Judge Allison had a conference call with the attorneys in Houston for F L R and the attorneys for TFMR in Brady. At the conclusion of the "telephone hearing", the temporary restraining order was dissolved. Judge Allison had previously authorized the trustee to start reading the notice of sale. At 3:45 p.m., he authorized the completion of the sale. The sale was concluded at about 3:58 p.m., with TFMR bidding $950,000.00. Mr. Olivere actually bid $5,000.00 more, but he did not have any funds to complete the purchase.

Thereafter, F L R was dispossessed and TFMR took possession of the ranch. Subsequently, F L R filed this suit for title and possession of the ranch and damages. TFMR answered and filed a counterclaim for a declaratory judgment as to the validity and effect of the trustee's deed, a deficiency judgment and order to enjoin F L R from interfering with TFMR's ownership, possession and

control of the Flying L Ranch. The claim for a deficiency judgment was nonsuited during trial. Following a jury verdict, judgment was entered that the trustee's deed was valid and effective to convey title to TFMR, and it was ordered that F L R take nothing on its claim for title and possession of the ranch.

By its first point, F L R complains of the trial Court's judgment on the trespass to try title issue in the case and urges that it has shown a superior title and possession from which it was forcibly evicted by TFMR. At the conclusion of F L R's case, the Court granted a motion for instructed verdict as to the 167-acre tract because the evidence established that F L R had previously parted with its title by a deed to Mr. Olivere, trustee for Majestic Garage Corporation. Having passed title to a third party and placed them in possession, F L R could not contend that it had possession up to the time that it was dispossessed in June, 1974, following the trustee's sale. Continuous possession was essential to its claim by reason of its prior possession. Land v. Turner, 377 S.W.2d 181 (1964). Thus, we conclude that the trial Court properly granted the motion for instructed verdict as to the 167-acre tract.

A more difficult question arises as to the proof of title to the 541-acre tract. F L R made its claim of title from a common source by attempting to show that TFMR was holding under F L R. Temple Lumber Co. v. Arnold, 14 S.W.2d 926 (Tex. Civ. App.—Beaumont 1929, writ dism'd); Jones v. Parker, 193 S.W.2d 863 (Tex. Civ. App.— Texarkana 1946, writ ref'd n.r.e.). As proof, it offered the deed of trust, dated February 28, 1973, given by F L R to secure the $3,000,000.00 loan to TFMR and then offered the substitute trustee's deed

"* * * not for proof of title, but for the proof of common source only, and for that limited purpose under the rules." See Rule 798, Tex.R.Civ.P. Although the exhibit is marked as Plaintiff's Exhibit 31 and Defendant's Exhibit 34, it was never offered by Defendant-Appellee as proof of its title. Mr. Blodgett, the substitute trustee, did testify as to the sale and the subsequent execution and filing of the deed. But, as a general rule, an interest in real property can be established only by a valid written instrument and not by parol evidence. City of Mission v. Popplewell, 156 Tex. 269, 294 S.W.2d 712 (1956); 56 Tex.Jur.2d, Trespass to Try Title, Section 125.

The general rule with regard to an instrument offered for a limited purpose is set forth in 56 Tex.Jur.2d, Trespass to Try Title, Section 128, as follows:

> "The Plaintiff has the right to introduce evidence for the purpose only of proving a common source of title, and where this is done, such evidence will not be considered for the purpose of showing title in the defendant, unless the evidence is introduced by him. This principle is also set forth by rule, where proof of common source is made by plaintiff by certified copies of deeds, as authorized. The result is that proof of common source may be made and yet, there may be no evidence of title in the defendant. * * *"

This principle has been recognized and applied in cases holding that instruments showing a common source of title will not be considered for the purpose of showing title in the defendant, unless it is offered by him. Bosse v. Cadwallader, 86 Tex. 336, 24 S.W. 798 (1894); Young v. Trahan, 97 S.W. 147 (Tex. Civ. App. 1906,

writ ref'd); Davis v. Gale, 160 Tex. 309, 330 S.W.2d 610 (1960).

In Hovel v. Kaufman, 280 S.W. 185 (Tex. Comm'n App. 1926, opinion adopted), the Court commented upon the language used in the Bosse case, and said:

> "The correct rule is that, whenever a plaintiff, in a suit in trespass to try title, undertakes to sustain his claim of title by proof of common source, he must show, in order to make a prima facie case for himself, not only that both he and the defendant claim title under a common source, but also must show that the title emanating from the common source which the plaintiff claims is superior to that claimed by defendant, *and that plaintiff holds such title.* * * *" (Emphasis added).
>
> * * *
>
> "The plaintiff in error having failed to show, before she rested her case, that she held the title to the land, the defendant in error was not placed under the necessity of introducing any proof at all, and the trial court properly instructed a verdict for the latter."

That decision was followed in Tate v. Johnson, 140 S.W.2d 288 (Tex. Civ. App.—Fort Worth 1940, writ dism'd jdgmt cor.), where the Court said:

> "It is contended that the court erred in entering judgment against plaintiff on the evidence introduced by plaintiff showing title in another, when the instruments were only offered for the purpose of showing common source. * * *"
>
> * * *

> "* * * While in this case plaintiff did not trace the title into defendants, but he did, by his evidence, show that title had been divested out of himself.
>
> "Plaintiff relies upon Article 7382, R.C.S., which in effect provides that evidence introduced by plaintiff to show common source cannot be considered as evidence of a title in defendant unless offered by him, yet in Hovel v. Kaufman, Tex. Com. App., 280 S.W. 185, at page 188, it was said: 'But this statutory provision in no wise precludes a consideration of such evidence for the purpose of determining if the plaintiff has discharged the burden of proving that he really has title to the land as he claims to have.'
>
> "It is a well settled rule of law in this State that in trespass to try title, plaintiff must recover, if at all, upon the strength of his own title. The burden is upon him to prove a prima facie right of title and possession; if he fails to discharge that burden he cannot recover, and where defendant is shown to be in possession, as in this case, judgment will be entered for the defendant. * * *"

Thus, we conclude that the trustee's deed which was offered for a limited purpose did not establish title in TFMR, but it did prove that F L R had parted with its title to the Ranch. Thus, having no title, it could not recover in this case.

There is yet another reason why the Appellant cannot prevail under the facts in this case. In Jasper State Bank v. Braswell, 130 Tex. 549, 111 S.W.2d 1079 (Tex. Comm'n App. 1938, opinion adopted), the Court in an opinion by Commissioner Smedley said:

> "* * * It is settled in this state that a mortgagee who has purchased the land at foreclosure sale,

> irregular or void as to the mortgagor (or as to one having title under the mortgagor), and who has taken possession under and in reliance upon such foreclosure and purchase, may retain possession against the suit of the mortgagor, or one holding under him, until his debt is paid. * * *"

The same result was reached in another opinion by Commissioner Smedley in Connor Bros. v. Williams, 130 Tex. 572, 112 S.W.2d 709 (Tex. Comm'n App. 1938, opinion adopted). Both of those cases were followed in Willoughby v. Jones, 151 Tex. 435, 251 S.W.2d 508 (1952), where Justice Garwood writing for the Court said:

> "* * * Although admittedly the petitioner upon his foreclosure purchase went into possession of the lands described in the petition of the respondents in the present case and is still in possession, respondents have not made a tender of the mortgage debt, which, at least in the ordinary case of a mortgage in possession under a foreclosure void as to the mortgagor-plaintiff, would be a necessary prerequisite for a successful title action by the latter against the former. Jasper State Bank v. Braswell, 130 Tex. 549, 111 S.W.2d 1079, 115 A.L.R. 329; Connor Bros. v. Williams, 130 Tex. 572, 112 S.W.2d 709."

To the same effect are the holdings in Dyess v. West's Estate, 257 S.W.2d 737 (Tex. Civ. App.—Galveston 1953, writ ref'd n.r.e.); Edinburgh Theatres, Inc. v. Richter, 367 S.W.2d 354 (Tex. Civ. App.—San Antonio 1963, no writ); Whalen v. Etheridge, 428 S.W.2d 824 (Tex. Civ. App.—San Antonio 1968, writ ref'd n.r.e.). The first point of error is overruled.

F L R next contends that the trustee's sale was invalid for several reasons which we shall note. First, it is contended that there was no notice of default, acceleration and foreclosure presented to F L R. On August 6, 1973, a letter was written to F L R advising of default. On December 6, 1973, another letter was written with regard to default. In addition to the written notices, there is substantial evidence of oral notice of default at other times prior to the foreclosure. The issue of acceleration was removed from the suit when TFMR took a nonsuit on its counterclaim for a deficiency judgment. The final judgment in this case did not provide for recovery of any sum of money and thus, there is no issue of acceleration and recovery for the full amount due on the note. With regard to notice of foreclosure, the evidence is undisputed that the substitute trustee did post the notices as provided for in the deed of trust. All of the claims with regard to lack of notice are without merit.

Next, it is urged that Bill Blodgett, the substitute trustee, was not of the same quality and independent character as the original trustees. As shown by the evidence, he was an agent and attorney for TFMR. The jury failed to find that, while acting as substitute trustee, he was under the exclusive direction and control of TFMR. There is no attack as such upon that answer. The evidence indicates that he was properly appointed, complied with the law in conducting the sale, and the sale is not invalid because of any acts upon his part as trustee under the deed of trust.

It is further urged that the sale was invalid because it was commenced before the temporary restraining order was dissolved. Because of the action taken by F L R

in deciding to go to Brady to get the temporary restraining order, rather than have the scheduled hearing in Houston, it was necessary for Judge Allison to act on short notice once a hearing was requested. He specifically authorized the trustee to commence reading the notice of sale and lengthy property description before the temporary restraining order was dissolved. Otherwise, the hearing would have been an exercise in futility because the notice and description could not have been read after the hearing was concluded at 3:45 and the sale completed by 4:00 p.m. as required by law. The controlling point is the fact that the jury found that the Court dissolved the temporary restraining order at 3:45 p.m. and the sale was completed at 3:58 p.m. No attack is made on those findings.

Lastly, it is contended that the consideration bid by TFMR was grossly inadequate. The jury failed to find that the trustee received grossly inadequate consideration for the property. We cannot say that such answer is clearly wrong, nor that an affirmative answer was established as a matter of law. It must be remembered that all construction had stopped, many promises to property owners were unfulfilled, the sale of lots had practically ceased, suits and liens had been filed and the project development was no longer viable. Point of error, number II, is overruled.

F L R next contends that the trial Court erred in issuing its verbal order dissolving the temporary restraining order. We find the point does not present reversible error for several reasons. First, at the time the temporary restraining order was signed, no pleadings had been filed and none were filed in Judge Allison's Court until 9:10

a.m. the next morning. At that time, there was pending an identical suit in the 190th District Court in Harris County. "The general common law rule in Texas is that the court in which suit is first filed acquires dominant jurisdiction to the exclusion of other coordinate courts." Curtis v. Gibbs, 511 S.W.2d 263 (Tex. 1974). Judge Allison, as a witness in this case, testified that he was not told at the midnight meeting that an identical suit was filed, and in fact set for hearing in Houston the next morning. In order to recognize that dominant jurisdiction, he took the only course available to him, and that was to dismiss the temporary restraining order. Of course, at that time the Houston suit had been nonsuited, and F L R was left with no case or time to seek a temporary restraining order before the sale was completed. But it was their choosing to file one suit, leave it and go elsewhere for relief and not tell the judge in Brady of the pending suit in Houston. Having made this bed, they must now sleep in it.

Rule 680, Tex. R. Civ. P., permits the adverse party, on such notice as the Court may prescribe, to move to dissolve the temporary restraining order and requires the Court to determine such motion as expeditiously as the ends of justice require. We believe the District Judge did as the rule requires, recognizing the position he had been placed in after learning of the Houston suit and the unavailability of counsel for F L R. At the conclusion of the telephone conference call, he determined that the temporary restraining order should be dissolved. One of the exhibits identified by Judge Allison was a copy of the order dissolving the temporary restraining order, bearing Judge Allison's signature, and reciting that the tempo-

rary restraining order was set aside and dissolved as of 3:45 p.m. on June 4, 1974. We find no error in the entry of that order. Point of error, number III, is overruled.

The next seven points are all presented without any citation of authority in support of them, but, nevertheless, we shall consider and pass on each of the points. The fourth point complains of the jury's answers to Special Issues 12 and 13 and urges that those answers should be disregarded and this Court determine that the price bid at the sale was grossly inadequate. As previously noted, the jury in Issue 12 failed to find that the price bid at the trustee's sale was grossly inadequate consideration. The negative answer only means that F L R failed to carry its burden of proof on the issue. C. & R. Transport, Inc. v. Campbell, 406 S.W.2d 191 (Tex. 1966). The contrary has not been established as a matter of law. Issue No. 13 as to market value was improperly worded, and the answer is meaningless, but it was an issue requested by F L R and to which it made no objection either to the issue or the answer. Thus, no error is presented. The point is overruled.

The next point urges that the trial Court erred in not disregarding the answer to Special Issue No. 2. The issue inquired if F L R submitted plans, specifications and cost of improvements for a club house to TFMR in June, 1973. The jury answered in the negative. Again, the answer only means a failure to carry the burden of proof on the issue. Although there was evidence to support an affirmative answer, we cannot say that such answer was established as a matter of law. Point of error, number V, is overruled.

Point of Error, number VI, contends the trial Court erred in submitting Special Issues Nos. 15-26. First, the point is multifarious in attacking eleven unrelated issues. Chemical Cleaning, Inc. v. Chemical Cleaning and Equipment Service, Inc., 456 S.W.2d 724 (Tex. Civ. App.—Beaumont), writ ref'd n.r.e. per curiam 462 S.W.2d 276 (Tex. 1970); Holzapfel v. Brueggman, 404 S.W.2d 916 (Tex. Civ. App.—Corpus Christi 1966, writ ref'd n.r.e.). The argument only relates to three or four of the issues, and no authority is cited in support of the contention. The Appellant's objections to the charge are not included in the transcript with the judge's endorsement thereon as required by Rule 272, Tex.R.Civ.P., in a case tried prior to January 1, 1976. No reversible error is shown. The point is overruled.

Point of error, number VII, complains of a failure to grant a mistrial during voir dire examination. There is no assignment of such error in the motion for new trial, and the complaint has been waived. Rules 324 and 325, Tex.R.Civ.P. The point is overruled.

The next two points urge error as shown at a hearing on jury misconduct. It does not reasonably appear from the evidence, both at the hearing of the motion and the trial of the case and from the record as a whole, that injury probably resulted to FLR. Rule 327, Tex.R.Civ.P. Where the trial Court, in ruling on a motion for new trial based upon jury misconduct, does not file express findings, it will be presumed on appeal that the Court found all controverted facts in support of the judgment overruling the motion for new trial, and that no misconduct occurred. Brungs v. Consolidated Plan Service, Inc., 529 S.W.2d 79 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.). Points of error VIII and IX are overruled.

The Appellant's tenth and final point complains that the trial Court erred in failing to grant a new trial on the basis of newly discovered evidence following the hearing on the motion for new trial. The motion is made with regard to the testimony of the one juror who signed an affidavit in connection with the claim of jury misconduct and which was attached to the motion for new trial. This juror was not one of the ten who signed the jury verdict. We have considered the contentions presented by the motion, and conclude that the trial Court did not err in overruling the motion. The point of error is overruled.

The judgment of the trial court is affirmed.

/s/ MAX N. OSBORN
Max N. Osborn, Associate Justice

August 18, 1976

APPENDIX B

Orders Of Supreme Court Of Texas

IN THE
SUPREME COURT OF T EXAS

NO. B-6346

May 4, 1977

F L R CORPORATION

v.

BILL BLODGETT, TRUSTEE ET AL.

From Bandera County, Eighth District

Application of petitioner for writ of error to the Court of Civil Appeals for the Eighth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant F L R Corporation, and its surety, Lawyers Surety Corporation, pay all costs incurred on this application.

June 8, 1977

NO. B-6346

F L R CORPORATION

v.

BILL BLODGETT, TRUSTEE ET AL.

From Bandera County, Eighth District

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this, the 24th day of June, 1977.

GARSON R. JACKSON, Clerk

By H. ZANE BECK, Deputy.
H. Zane Beck

APPENDIX C

Notice Of Appeal

NO. 6516

IN THE
COURT OF CIVIL APPEALS
FOR THE EIGHTH SUPREME JUDICIAL DISTRICT
OF TEXAS
AT EL PASO, TEXAS

F L R CORPORATION, Appellant

v.

BILL BLODGETT, TRUSTEE and
TEXAS FIRST MORTGAGE REIT,
TEXAS FIRST MORTGAGE REIT, Appellees

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that F L R Corporation, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of this Court in affirming the lower Court which Judgment was appealed to the Supreme Court of Texas by Application for Writ of Error which Application was denied and Motion for Rehearing upon said application for Writ of Error having been overruled by the Supreme Court of Texas on the 8th day of June, 1977.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Respectfully submitted this 16th day of June, 1977.

/s/ WENDELL S. LOOMIS
Wendell S. Loomis
Attorney for FLR Corporation
1012 Esperson Building
808 Travis
Houston, Texas 77002
(713) 225-0761

CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing document was delivered to the following parties on the date and at the addresses indicated:

VINSON, ELKINS, SEARLS, CONNALLY & SMITH

Mr. Kenneth E. Johns, Jr.
First City National Bank Bldg.
Houston, Texas 77002

THE METHOD OF DELIVERY WAS AS FOLLOWS:

X Certified Mail, Return Receipt Requested
Regular Mail
Delivery in Person

Delivery To: _____

For: _____

Dated: June 16, 1977

/s/ WENDELL S. LOOMIS
Wendell S. Loomis
Esperson Building, Suite 1012
808 Travis
Houston, Texas 77002
(713) 225-0761

APPENDIX D

Rule 680, T.R.C.P.

Rule 680. Temporary Restraining Order

No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed ten days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the application for a temporary injunction shall be set down for hearing at the earliest possible date and takes precedence of all matters except older matters of the same character; and when the application comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a temporary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice

to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

APPENDIX E

Article 3810, V.A.C.S.

Art. 3810. [3759] [2369] [2310a] Sales under deed of trust

All sales of real estate made under powers conferred by any deed of trust or other contract lien shall be made in the county in which such real estate is situated. Where such real estate is situated in more than one county then notices as herein provided shall be given in both or all of such counties, and the real estate may be sold in either county, and such notice shall designate the county where the real estate will be sold. Notice of such proposed sale shall be given by posting written notice thereof for three consecutive weeks prior to the day of sale in three public places in said county or counties, one of which shall be made at the courthouse door of the county in which such sale is to be made, and if such real estate be in more than one county, one at the courthouse door of each county in which said real estate may be situated, or the owner of such real estate may, upon written application, cause the same to be sold as provided in said deed of trust or contract lien. Such sale shall be made at public vendue between the hours of 10 o'clock a.m. and 4 o'clock p.m. of the first Tuesday in any month. When any such real estate is situated in an unorganized county, such sale shall be made in the county to which such unorganized county is attached for judicial purposes. Acts 1889, p. 143; G.L. vol. 9, p. 1171; Acts 1st CS 1915, p. 32; Acts 1915, p. 84.

APPENDIX F

Temporary Restraining Order

NO. 237

F L R CORPORATION

v.

BILL BLODGETT, TRUSTEE and
TEXAS FIRST MORTGAGE REIT

IN THE DISTRICT COURT OF
BANDERA COUNTY, TEXAS
198th JUDICIAL DISTRICT

On the 3rd day of June, 1974, came on to be heard Plaintiff's Application for Temporary Restraining Order, and came the Plaintiff by its agents and Attorney and the Court, there being no time for notice to Defendant, proceeded to consider Plaintiff's verified application and the arguments of Counsel and finding that Plaintiff will suffer irreparable injury if Defendant Texas First Mortgage REIT is allowed to foreclose its Deed of Trust on the property therein described and that Defendant would not be injured or inconvenienced by a temporary delay, the Court was of the opinion that the application of Plaintiff should be granted and it was accordingly

ORDERED that Texas First Mortgage REIT and Bill Blodgett shall be and are hereby temporarily restrained and enjoined from conducting Trustee's Sale upon the property of FLR Corporation described in Exhibit A of said Application and it was further

ORDERED that Plaintiff make bond of good and sufficient sureties in the sum of $5,000.00 to be approved by the Clerk of the Court, and it is further

ORDERED that hearing hereon for temporary restraining order pending this suit shall be had before this Court at 10 a.m. on 11th of June, 1974.

RENDERED and SIGNED this the 4th day of June, 1974 at 12:15 o'clock p.m.

A. P. ALLISON
Judge Of Said Court

NO. 237

F L R CORPORATION

v.

BILL BLODGETT, TRUSTEE and
TEXAS FIRST MORTGAGE REIT

IN THE DISTRICT COURT OF
BANDERA COUNTY, TEXAS
198th JUDICIAL DISTRICT

B O N D

WHEREAS in the above entitled and numbered cause, plaintiff was granted a temporary restraining order against defendants, and, in the order granting such temporary restraining order, the Court required plaintiff to file with the Clerk a bond in the sum of FIVE THOUSAND AND NO/100 DOLLARS ($5,000.) payable to said defendants, approved and conditioned as the law requires;

NOW THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that we, as Principal, and the other undersigned hereto as sureties, acknowledge ourselves bound to pay to the adverse party in the above entitled and numbered cause, the sum of FIVE THOUSAND AND NO/100 DOLLARS ($5,000.) conditioned that applicant and plaintiff in such cause, will abide by the decision which may be made in such cause, and that it will pay all sums of money and costs that may be adjudged against it if

the temporary restraining order shall be dissolved in whole or in part.

WITNESS, our hands this 4th day of June, 1974.

By /s/ R. R. OLIVERE
FLR Corporation
R.R. Olivere, Agent &
Attorney In Fact

By /s/ WENDELL S. LOOMIS
Lawyers Surety Corp.
Wendell S. Loomis
Attorney In Fact

APPROVED AND FILED this 4th day of June, 1974

/s/ OLGA SCHMIDT
District Clerk, Bandera County, Texas

Supreme Court, U. S.
FILED
OCT 5 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-359

FLR CORPORATION, *Appellant,*

v.

BILL BLODGETT, TRUSTEE and TEXAS FIRST MORTGAGE REIT, *Appellees.*

On Appeal From The Supreme Court Of Texas

MOTION PURSUANT TO RULES 16(b) and 16(d) TO DISMISS APPEAL OR AFFIRM JUDGMENT

JOHN B. HOLSTEAD
KENNETH E. JOHNS, JR.
D. BOBBITT NOEL, JR.
Attorneys for Appellees

Of Counsel:

VINSON & ELKINS
2100 First City National
Bank Building
Houston, Texas 77002
(713) 651-2628

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-359

FLR CORPORATION, *Appellant*,

v.

BILL BLODGETT, TRUSTEE and TEXAS FIRST MORTGAGE REIT, *Appellees*.

On Appeal From The Supreme Court Of Texas

MOTION PURSUANT TO RULES 16(b) AND 16(d) TO DISMISS APPEAL

Bill Blodgett, Trustee, and Texas First Mortgage Reit (TFMR), Appellees in the case sought to be appealed to this Court, move pursuant to Rule 16(1)(b) of the Rules of the Supreme Court of the United States to dismiss the appeal on the ground that: (1) the federal questions sought to be reviewed were not timely raised under the Texas Rules of Civil Procedure, (2) the questions asserted by Appellant were not questions passed on by the Supreme Court of Texas, (3) the Opinion of

the Court sought to be reviewed rests on a substantial and adequate non-federal basis, and (4) no substantial federal question is raised.

In the alternative, Appellee moves pursuant to Rule 16(1)(d) of the Rules of the Supreme Court of the United States to affirm the judgment and order of the Supreme Court of Texas on the ground that the decision of the lower court is so obviously correct as to warrant no further review by this Court.

OPINION

The Opinion of the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas is reported at 541 S.W.2d 209 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.), and is set forth at Appendix A of Appellant's Jurisdictional Statement.

STATEMENT OF THE CASE

The Opinion of the Texas Court of Civil Appeals correctly stated the nature and result of this case. Since Appellant's statement of the case contains extraneous conclusions and omissions of significant facts, we present our own statement of the case.

This case did not begin, as Appellant states, in Brady, Texas, with the issuance of a temporary restraining order by Judge A. P. Allison of the 198th Judicial District Court, Bandera County, Texas. Rather, the case began the preceding afternoon in Houston, Harris County, Texas, on June 3, 1974, at approximately 4:50 p.m. when FLR Corporation filed suit under Cause No. 984,178 in the 190th Judicial District Court of Harris

County, Texas, requesting that Court to issue an *ex parte* temporary restraining order to enjoin a trustee's foreclosure sale scheduled to be held the next day on June 4, 1974. 190th District Court Judge Madison Rayburn, at the request of Appellees' counsel, agreed to hold a hearing on Appellant's application for a temporary restraining order at 9:00 a.m. the next morning, June 4, 1974. During the night of June 3, 1974, while Appellees' counsel was preparing to appear at the hearing in Judge Rayburn's Court, FLR Corporation and its counsel flew several hundred miles to Brady, Texas, where Judge A. P. Allison of the 198th Judicial District Court was spending the night. In Brady, shortly after midnight, Judge A. P. Allison granted a temporary restraining order. Judge Allison appeared and testified during the trial of this cause and stated that he was not informed by Appellant when it applied for the temporary restraining order that the identical suit was then pending in Harris County, Texas, and scheduled for hearing at 9:00 a.m. the following morning.

The following morning on June 4, 1974, at approximately 9:10 a.m., Appellant filed suit in the 198th Judicial District Court, Bandera County, Texas, under Cause No. 237. Not aware of Appellant's actions, Appellees' counsel appeared at Judge Rayburn's Court in Houston prior to 9:00 a.m. the next morning for the scheduled hearing. At approximately 9:25 a.m., a third lawyer entered Judge Rayburn's courtroom and filed a non-suit on behalf of FLR Corporation in the Harris County suit. Counsel for Appellees learned later during the morning of June 4, 1974, that Judge Allison had issued an *ex parte* temporary restraining order the previous night.

After learning of the order issued by Judge Allison, Appellees requested a hearing which was scheduled for 3:00 p.m. that afternoon. At 11:46 a.m. on June 4, 1974, notice of the 3:00 p.m. hearing to be held by Judge Allison was hand delivered to Mr. Richard Olivere, Chief Executive Officer and President of FLR Corporation. Present at the FLR offices in Bandera with Mr. Olivere when the notice of hearing was delivered was Mr. D. Lee, one of the attorneys who had accompanied Mr. Olivere the previous night to see Judge Allison. Additionally, prior to departing Houston for the trip to Brady, Texas, counsel for Appellees delivered a notice of the hearing to the office of Appellant's counsel and offered him a ride to Brady. Appellees later learned the reason they could not contact Appellant's counsel was because he was returning to Houston from Bandera where he had spent the night. When Appellees arrived in Brady and it became apparent that Appellant and its counsel would not attend the scheduled hearing, a conference call was arranged and a telephone hearing was conducted.

During the course of the telephone hearing all parties were represented on the phone and all counsel participated in the hearing. The telephone hearing was conducted from the offices of the District Attorney in Brady, Texas, because his office was the only one having enough extension telephones located in various rooms to allow the Judge to be on one phone, Appellees' counsel to be in another room on a phone, and the Court Reporter to have an extension. On the Appellant's end of the conference call were Mr. Richard Olivere, President of Appellant, and two lawyers, Mr. Wendell S. Loomis and Mr. Dale Lee. Even though Mr. Olivere and Mr.

Lee both received notice of the scheduled hearing prior to 12:00 noon, neither of them elected to attend the hearing scheduled some three hours later in Brady. The distance between Brady and Bandera is approximately 125 miles and could easily be travelled within the three hour period between receipt of the notice and the scheduled time for the hearing, without exceeding the 70 m.p.h. posted speed limit.

The Court concluded the telephone hearing at approximately 3:45 p.m. by dissolving the temporary restraining order. Subsequently, the trustee held and conducted a foreclosure sale in accordance with the contractual provisions of the Deed of Trust executed between Appellant and Appellee. Following the foreclosure sale Appellees gave Appellant an option to repurchase the land sold by the Trustee. The purchase price under the option was the amount of principle, interest and expenses owing on the debt. By Appellant's own testimony given at the trial, it made no effort to exercise the option.

Appellant indicated an intention to challenge on unspecified grounds the dissolution of the temporary restraining order and thereafter filed an Appeal Bond in the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas sitting at San Antonio, Texas. The Appeal Bond was docketed under Cause No. 15,347 on June 24, 1974. The appeal was dismissed on September 4, 1974, in accordance with Rule 415, Tex. R. Civ. P. (Appendix A, Pg. 21) because Appellant failed to prosecute its appeal and file its brief within the time prescribed.

On September 3, 1974, Appellant sued Appellees again in Bandera County, Texas, under Cause No. 253

and sought to recover the reasonable rental value of the real estate because Appellee had taken possession of it subsequent to the sale and after expiration of the option. This suit was consolidated with the previously filed suit, No. 237 pending in the 198th Judicial District Court, and both cases were set for trial on September 30, 1974.

A few days before the scheduled trial date Appellant filed a Chapter XI proceeding in the Bankruptcy Court of the United States District Court for the Western District of Texas, San Antonio Division. Under the provisions of Bankruptcy Rule 11-44, Appellee was stayed from the prosecution of any lawsuit involving Appellant. Thereafter, Appellee applied to the Bankruptcy Court for permission to have the stay annulled and to proceed to trial in Bandera County, Texas, against Appellant. The Bankruptcy Judge, after a hearing in which he considered, *inter alia*, the circumstances of the foreclosure sale, lifted the stay order and allowed Appellee to proceed to trial in the 198th Judicial District Court of Bandera County, Texas. In the Findings of Fact and Conclusions of Law signed by the Bankruptcy Judge on December 23, 1974, the Bankruptcy Judge found that Judge Allison's restraining order had been lifted upon Appellee's motion after notice to Appellant. Appellant elected not to exercise his rights to appeal the Bankruptcy Judge's order.

The consolidated cases proceeded to trial in Bandera County, Texas. The trial lasted approximately two weeks and resulted in a jury verdict in favor of Appellee. The Texas Court of Civil Appeals affirmed the trial court. Appellant's motion for a re-hearing by the Texas Court of Civil Appeals was denied. The Texas Supreme Court

refused to grant a Writ of Error finding No Reversible Error. A rehearing was denied.

ARGUMENT

THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS NOT TIMELY RAISED OR EXPRESSLY DECIDED

Appellant belatedly attempts to contend that it has seasonably raised a constitutional challenge to the dissolution of the temporary restraining order, and to the construction allegedly given to Rule 680, Tex. R. Civ. P. (Appendix A, Pg. 22) by the Texas Court of Civil Appeals and the Texas Supreme Court. Appellee submits Appellant has failed to preserve for appellate review the errors now being asserted.

After dissolution of the temporary restraining order Appellant filed an Appeal Bond on June 24, 1974, in the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio, Texas. The Appeal was docketed under Cause No. 15,347. Appellant never specified the errors upon which the intended appeal was to be based. On September 4, 1974, in accordance with Rule 415, Tex. R. Civ. P. the appeal was dismissed by the Texas Court of Civil Appeals because Appellant failed to file its briefs. (Appendix B).

Following a jury trial, Appellant did not complain in its Motion for New Trial nor in its Amended Motion for New Trial of the errors it now seeks to have reviewed. Rule 324, Tex. R. Civ. P. (Appendix A, Pg. 19) required Appellant to file a Motion for New Trial. Rule 374, Tex. R. Civ. P. (Appendix A, Pg. 20) provides in pertinent part that:

> " . . . A ground of error not *distinctly* set forth in the motion for new trial, in cases where a motion for new trial is required *shall be considered as waived.*" (Emphasis added.)

This Court has repeatedly ruled that it will not review assignments of error not seasonably raised in accordance with the requirements of state law and passed upon in the judgment of the state court brought for review. *Edelman v. California,* 344 U.S. 357, 358 (1953); *Herndon v. Georgia,* 295 U.S. 441, 443 (1935); *Waters-Pierce Oil Co. v. Texas,* 212 U.S. 112, 115 (1909); *McCorquodale v. Texas,* 211 U.S. 432, 437 (1908); *Fullerton v. Texas,* 196 U.S. 192, 193 (1904).

In 1941 the Texas Rules of Civil Procedure were adopted thereby superseding and eliminating the previous statutory basis for the review of unassigned errors called "fundamental error". Since 1941, however, courts have still considered on a limited basis fundamental errors. In the early case of *Ramsey v. Dunlop,* 146 Tex. 196, 205 S.W.2d 979 (1947), cited by Appellant, it was held that the Court of Civil Appeals correctly reversed a trial court judgment in an election contest case on an error that had not been assigned as error in appellant's brief to that court. The Texas Supreme Court affirmed applying the doctrine of fundamental error. Chief Justice Alexander in his concurring opinion, however, indicated that the application of the doctrine of fundamental error should be limited to cases where:

(1) the unassigned error involves a matter of public interest; and

(2) the record affirmatively and conclusively shows

that the appellee was not entitled to recover; or

(3) the record affirmativley shows that the court rendering the judgment was without jurisdiction over the subject matter.

Id. at 985.

Justice Alexander's limitations have been accepted as controlling. *Newman v. King,* 433 S.W.2d 420, 421-22 (Tex. 1968); *State v. Sunland Supply Co.,* 404 S.W.2d 316, 319 (Tex. 1966); *Holland v. Taylor,* 153 Tex. 433, 270 S.W.2d 219, 220 (1954). If anything, the doctrine of fundamental error is more narrowly construed by the courts of Texas today than by the court in *Ramsey.* In fact, where the rights asserted on appeal belong exclusively to the litigants, the courts have declined to review the error complained of as a fundamental error, *West Texas Utilities Co. v. Irvin,* 336 S.W.2d 609, 611 (Tex. 1960); and have required in the absence of a proper assignment of error that the error claimed as fundamental must appear on the face of the record in order to be reviewable by an appellate court. *McCauley v. Consolidated Underwriters,* 157 Tex. 475, 477, 304 S.W.2d 265, 266 (1957). In *Statler Hotels v. Rosenthal Jewelry Corp.,* 351 S.W.2d 579, 585 (Tex. Civ. App.—Dallas 1961, writ ref'd n.r.e.), it was held that no error deemed fundamental can be raised for the first time on appeal if an examination of the statement of facts is necessary to determine the question.

The errors complained of here do not constitute fundamental errors, nor were they seasonably raised. For example, Appellant raised the error set forth at page 5 of the Jurisdictional Statement for the first time in its

Reply Brief filed in the Court of Civil Appeals contemporaneously with the opening words of Appellant's oral argument. Under Texas procedure, the Appellant's assertion of error in such a manner was not seasonably made. Additionally, as conceded by Appellant at page 7 of its Jurisdictional Statement the Texas Court of Civil Appeals did not pass on the questions Appellant now seeks to raise.

THE JUDGMENT RESTS ON AN ADEQUATE NON-FEDERAL BASIS

The Texas Court of Civil Appeals determined that the controlling questions with respect to the temporary restraining order were whether Appellant had complied with the appropriate procedure in its initial application for the order and whether the issuing Judge had jurisdiction to issue the restraining order. Concluding that the order was improperly applied for and that Judge Allison had been mislead into issuing the order, the Court said:

> "First, at the time the temporary restraining order was signed, no pleadings had been filed and none were filed in Judge Allison's court until 9:10 a.m. the next morning. At that time there was pending an identical suit in the 190th District Court in Harris County. *The general common law rule in Texas is that the court in which suit is first filed acquires dominant jurisdiction to the exclusion of other coordinate courts.* (Citation omitted.) *Judge Allison, as a witness in this case, testified he was not told at the midnight meeting that an identical suit was filed, and in fact set for hearing in Houston the next morning. In order to recognize that dominant jurisdiction, he took the only course available to him, and that was to dismiss the temporary restraining order.*" 541 S.W.2d 209, 215. (Emphasis added.)

Having determined that a court other than Judge Allison's had prior jurisdiction of the case when the restraining order was issued, the Texas Court of Civil Appeals was not required to consider any questions concerning the issue of dissolution of the restraining order.

The lower court disposed of this case on the state procedural grounds that Appellant when seeking the restraining order had failed to comply with the proper state procedure, and had mislead Judge Allison.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

Appellant's assertion that Judge Allison's dissolution of the temporary restraining order at Appellees' behest and that the subsequent foreclosure sale constituted state action or action under the color of state authority resulting in the deprivation of constitutionally protected rights lacks merit. *Leisure Estates of America, Inc. v. Carmel Development Company,* 371 F.Supp. 556 (S.D. Tex., 1974) and *Hoffman v. United States Department of Housing and Urban Development,* 371 F.Supp. 576 (N.D. Tex., 1974), *aff'd,* 519 F.2d 1160 (5th Cir. 1974), both cited by Appellant, clearly held that a foreclosure sale pursuant to and in accordance with a contractual loan agreement and deed of trust does not involve state action or action under color of state law. Both cases applied the "significance of state action" tests enunciated in *Adams v. Southern California First National Bank,* 492 F.2d 324 (9th Cir. 1974), in determining whether the requisite state involvement was present to

find a violation of the Fourteenth Amendment. The court in *Adams,* applying the "significance of state action" tests used by this Court in such equal protection cases as *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972) and *Reitman v. Mulkey,* 387 U.S. 369 (1967), noted that it is "not perfectly clear that the same state action test" applies to due process cases, but that one must consider such cases with the concept in mind.

Appellant here maintains that the Court itself effected the foreclosure sale, by refusing to prohibit the sale, thus meeting the state action requirement of the Fourteenth Amendment. Appellee recognizes that in *Reitman,* this Court affirmed the California Supreme Court's finding that a provision of the California Constitution revoking certain anti-discriminatory laws was an authorization and encouragement of private discrimination and that this was such significant state involvement that the Fourteenth Amendment was applicable. The facts herein, however, are not analogous.

As mentioned above, the private, contractual foreclosure remedy of which Appellee was attempting to avail itself has not been held to be unconstitutional. Judge Allison's dissolution of an improperly obtained temporary restraining order does not constitute that significant state action necessary to raise a substantial federal question. Judge Allison was not authorizing or encouraging or in any way affirmatively supporting the foreclosure sale; he was merely dissolving a temporary restraining order that had been improperly granted because of: (1) Appellant's lack of compliance with state procedural requirements, and (2) a lack of jurisdiction in the issuing court due to dominant jurisdiction in the Houston court.

Appellee respectfully requests this Court to dismiss the appeal.

MOTION TO AFFIRM JUDGMENT

Alternatively, Appellee moves pursuant to Rule 16(1)(d) of the Rules of the Supreme Court of the United States to affirm the judgment and order of the Supreme Court of Texas on the ground that the decision of the lower court is so obviously correct as to warrant no further review by this Court.

The Houston court in the first suit filed by FLR scheduled a hearing on Appellant's application for a temporary restraining order for 9:00 a.m. the morning following the date on which the application was filed. At the scheduled hearing Appellant would have been afforded the opportunity to demonstrate its entitlement to an order restraining the scheduled foreclosure sale. Preferring instead to seek an *ex parte* restraining order without being required to justify the issuance of the order, Appellant flew 250 miles, awakened Judge Allison and mislead him into issuing the restraining order while failing to disclose to Judge Allison that the specific matter they sought to have him rule upon had previously been set for hearing the following morning in Harris County, Texas, and therefore another court had dominant jurisdiction of the controversy.

The following morning when Appellee appeared at the scheduled hearing in Houston, Texas, and learned of Appellant's actions, it requested a hearing from Judge Allison. Notice of the hearing was hand delivered to Appellant's President, Mr. Olivere, and received by him in the presence of Mr. Dale Lee, one of the two lawyers

who accompanied Mr. Olivere to see Judge Allison the previous night. Also, notice was hand delivered to Appellant's counsel's office. Despite having been furnished notice of the hearing, Appellant elected not to attend. When it became apparent to Judge Allison that Appellant would not attend the scheduled hearing, Judge Allison caused Appellant and both of its counsel to be contacted by telephone and afforded them the opportunity to present their views in a telephone hearing. At the conclusion of the telephone hearing Judge Allison dissolved the temporary restraining order. Although a telephone hearing is not the usual and customary manner in which temporary restraining orders are dissolved, such procedure in this case was mandated by Appellant's own actions.

The Texas Court of Civil Appeals recognized that Judge Allison's actions were caused by Appellant, and therefore did not violate Rule 680, Tex. R. Civ. P. The comments of the Texas Court of Civil Appeals concerning Judge Allison's actions were limited to the facts of this case, to-wit:

> "Rule 680, Tex. R. Civ. P. permits the adverse party, on such notice as the court may prescribe, to move to dissolve the temporary restraining order and requires the court to determine such motion as expeditiously as the ends of justice require. We believe the District Judge did as the Rule requires, *recognizing the position he had been placed in after learning of the Houston suit.*" 541 S.W.2d at 215. (Emphasis added.)

This Court has previously recognized that: ". . . due process is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific

factual contexts." *Hannah v. Larache,* 363 U.S. 420, 442 (1960). "[T]he very nature of due process negates any concept of inflexible procedure universally applicable to every imaginable situation." *Cafeteria and Restaurant Workers, Local 473 AFL-CIO v. McElroy,* 367 U.S. 886, 895 (1961). In *Ballard v. Hunter,* 204 U.S. 241, 255 (1907) this Court remarked:

> "A precise definition [of due process of law] has never been attempted. It does not always mean proceedings in court. (Citation omitted.) Its fundamental requirement is an opportunity for a hearing and defense, but no fixed procedure is demanded. The process or proceedings may be adapted to the nature of the case."

Appellant herein was given the opportunity to present his case to a court in Houston, Texas. Appellant elected not to attend the Houston hearing, and instead sought an *ex parte* conference with another Judge in an effort to obtain the same equitable relief which was the subject of the Houston hearing. Prior to dissolving the restraining order, Judge Allison scheduled another hearing which Appellant likewise refused to attend. Judge Allison thereafter placed a telephone call to the participants of the midnight conference and afforded them the opportunity to comment on or defend their entitlement to the restraining order.

Appellee submits that under the facts of this case, Appellant was afforded due process of law. This appeal boils down to a request by Appellant that this Court approve Appellant's actions of "forum shopping" and of being less than fully candid with the Court.

Appellee prays that this Court affirm the judgment of the Texas Supreme Court.

CONCLUSION

Appellee respectfully urges that the appeal should be dismissed because the errors sought to be raised have not been seasonably raised by Appellant or passed on by the lower court. The errors asserted do not under the facts of this case present a substantial federal question. Alternatively, Appellee submits that the lower courts reached a correct result and the judgment and order of the Texas Supreme Court should be affirmed.

Respectfully submitted,

JOHN B. HOLSTEAD
KENNETH E. JOHNS, JR.
D. BOBBITT NOEL, JR.
2100 First City National
Bank Bldg.
Houston, Texas 77002

Of Counsel:

VINSON & ELKINS
2100 First City National
Bank Building
Houston, Texas 77002
(713) 651-2628

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion Pursuant to Rules 16(b) and 16(d) to Dismiss Appeal or Affirm Judgment has been duly served upon the following by United States Mail, postage prepaid, on this the _____ day of _____, 1977:

CERTIFIED MAIL

Mr. Wendell S. Loomis
Attorney at Law
1012 Esperson Building
Houston, Texas 77002

Mr. Samuel Intrater
Brick & Intrater
1025 Vermont Avenue, N.W.
Washington, D.C.

KENNETH E. JOHNS, JR.

APPENDIX A

TEXAS RULES OF CIVIL PROCEDURE

Rule 324. Prerequisites of Appeal

In all cases tried in the county or district court, where parties desire to appeal from a judgment of the trial court, a motion for new trial shall be filed as a prerequisite to appeal; provided that neither a motion for new trial nor an assignment therein shall be a prerequisite to the right to complain on appeal of the action of the court in giving a peremptory instruction, or in rendering or refusing to render judgment non obstante veredicto or notwithstanding the finding of the jury on one or more special issues, or in overruling a motion for judgment on the verdict made by the party who becomes appellant; nor shall a motion for new trial be required in a non-jury case or in a case where the appeal is based upon some error of the trial court arising after its action upon the motion for new trial. But a motion for new trial shall be a necessary prerequisite to consideration of the complaints mentioned in Rule 325. When judgment is rendered non obstante veredicto or notwithstanding the finding of the jury on one or more special issues, the appellee may bring forward by cross-point contained in his brief filed in the Court of Civil Appeals any ground which would have vitiated the verdict or would have prevented an affirmance of the judgment had one been entered by the trial court in harmony with the verdict, including although not limited to the ground that one or more of a jury's findings have insufficient support in the evidence or are against the overwhelming preponderance of the evidence as a matter of fact, and

the ground that the verdict and judgment based thereon should be set aside because of improper argument of counsel. In the event appellee assigns error by cross-point based upon an alleged improper argument of counsel, he shall support the same by proper bill of exceptions. The failure to bring forward by cross-points such grounds as would vitiate the verdict shall be deemed a waiver thereof, save and except such grounds as require the taking of evidence in addition to that adduced upon the trial of the cause. A motion for new trial shall not be necessary in behalf of appellee where he does not complain of the judgment or a part thereof.

Rule 325. Errors on Motions

In cases of motions for continuance, or for change of venue, or other preliminary motions made and filed in the progress of the cause, the rulings of the court thereon shall be considered as acquiesced in, unless complained of in the motion for new trial; and the judge may recite in his order disposing of the motion for new trial the grounds of such ruling. Nothing in Rule 324 shall render a motion for new trial unnecessary in the instances mentioned in this Rule nor in instances of newly discovered evidence, misconduct, fraud or the like.

Rule 374. Assignments of Error

The motion for new trial, when required to be filed under these rules, shall constitute the assignments of error on appeal or writ of error. A ground of error not distinctly set forth in the motion for new trial, in cases where a motion for new trial is required shall be considered as waived. Complaint of the action of the court

on all matters arising under circumstances where no motion for new trial is required by these rules, if relied upon on appeal, shall be included in the statement of points in the brief as hereinafter provided, and in such cases no assignments of error shall be necessary.

Rule 415. Briefs: Dismissal for Failure to File

When the appellant has failed to file his brief in the time prescribed, the appellate court may dismiss the appeal for want of prosecution, unless good cause is shown for such failure and that appellee has not suffered material injury thereby. The court, may, however, decline to dismiss the appeal, whereupon it shall give such direction to the cause as it may deem proper.

Rule 680. Temporary Restraining Order

No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed ten days, as the court fixes, unless within the time so fixed the order, for good causes shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer

period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the application for a temporary injunction shall be set down for hearing at the earliest possible date and takes precedence of all matters except older matters of the same character; and when the application comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a temporary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

APPENDIX B

Court of Civil Appeals

San Antonio, Texas

September 4, 1974

This is to inform you that in Cause No. 15,347 FLR Corporation, Appellant vs. Bill Blodgett, Trustee, and Texas First Mortgage Reit, Appellees, the Honorable Court of Civil Appeals today rendered judgment,

Appeal dismissed as moot in that briefs were not tendered.

Robert L. Cook, Clerk

Supreme Court, U. S.
FILED
OCT 26 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-359

FLR CORPORATION, *Appellant*

v.

BILL BLODGETT, ET AL, *Appellees*

Appeal From The Supreme Court Of The State Of Texas

ANSWER TO MOTION PURSUANT TO RULES 16(b) AND 16(d) TO DISMISS APPEAL OR AFFIRM JUDGMENT

SAMUEL INTRATER
BRICK & INTRATER
1025 Vermont Avenue, N.W.
Washington, D.C.
(202) 347-6943

Of Counsel:

WENDELL S. LOOMIS
1012 Esperson Building
808 Travis
Houston, Texas 77002
(713) 225-0761

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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Appeal From The Supreme Court Of The State Of Texas

ANSWER TO MOTION PURSUANT TO RULES 16(b) AND 16(d) TO DISMISS APPEAL OR AFFIRM JUDGMENT

REPLY TO APPELLEE'S STATEMENT

Appellant believed that it had stated the case adequately in its Jurisdictional Statement, however, as Appellee has presented its own statement of the case, we find it necessary to reply thereto.

Your Appellee in its STATEMENT OF THE CASE has knowingly violated the time honored briefing rules of this Court by inserting extraneous material not contained

in the record of the Appeal in its effort to discourage this Court from reviewing this matter and defeating Appellant's good faith effort to correct what Appellant contends is an obvious wrong done to it. When, and if, this Court reviews the record, the liberties taken by Appellee will become obvious.

Appellee is obviously in error when it states that this case began other than before the Honorable Judge A. P. Allison of the 198th Judicial District Court of Bandera County, Texas. There was an earlier case filed in the District Court of Harris County, Texas, however that case was dismissed and non-suited without prejudice by Plaintiff, Appellant here, at approximately 9:25 a.m. on June 4, 1974, and became entirely moot from that moment forward. There were no orders or decisions of any kind or nature whatsoever by the Judge in that earlier case. The Judge therein did not agree or disagree with anything presented and before it acted or had an opportunity to act, Judge Allison had issued a temporary restraining order and that earlier case was dismissed. Under Texas law it was entirely possible for the Defendants, Appellees here, to have maintained jurisdiction before Judge Rayburn in Harris County by the filing of a request for affirmative relief. However, they chose not to do so, but instead confirmed the jurisdiction of Judge Allison in Bandera by requesting affirmative relief from Judge Allison. After 9:25 a.m. June 4, 1974, there was only one Court with jurisdiction of the parties and the subject matter and that Court was in Bandera, Texas.

Appellee is in error in its statement of the case wherein it says it "delivered a notice of the hearing to the office of Appellant's and *offered him a ride to Brady*". Appellee

admits that Appellant's counsel was returning to Houston at the time and was not available for any such offer.

Insofar as Appellee implies that Appellant refused to travel to Brady for any hearing before Judge Allison, such implication is in error. It constitutes no part of the record. The Chief Executive Officer for Appellant, Mr. Richard Olivere, was in Bandera, Texas, with a friend who was an attorney licensed to practice law in the State of California and not in the State of Texas. Mr. Lee was not acting and could not act as Mr. Olivere's attorney or as attorney for the FLR Corporation, and was not, and could not, be presumed to be acquainted with the technical aspects of the Texas Rules of Civil Procedure pertaining to Temporary Restraining Orders and injunctions.

With regard to Appellee's assertion that it gave Appellant "an option to repurchase the land sold by the Trustee" such is irrelevant and immaterial to this appeal, is not an issue in this case, and although it constitutes part of the record, such "option to repurchase the land" as will be seen by the record was an impossible and meaningless grant when finally submitted. However, that "option to repurchase" was a specific condition imposed by the Honorable Judge Allison as consideration for his dissolution of the restraining order. (Plaintiff Exhibit 30).

The filing of an Appeal Bond following the dissolution of the Temporary Restraining Order is entirely irrelevant to this appeal and constitutes no part of the record. This preliminary intent to appeal the order of dissolution was abandoned by Appellant. Appellant specifically and intelligently declined to move forward with that appeal and permitted it to be dismissed *without prejudice* in

accordance with Texas Law for the reason that Appellant did not feel that the matter had been fully developed and that it would not be fair to Appellant, Appellee, or the Appellate Court to prosecute such a preliminary and limited appeal. However, this matter is entirely irrelevant and immaterial to the matters before this Court and it constitutes no part of the record before the lower courts and is utterly meaningless to this appeal.

Also irrelevant and immaterial, constituting no part of the record, and utterly meaningless to this appeal, is the order of the Bankruptcy Judge on December 23, 1974, which order permitted the prosecution of the instant case before Judge Allison rather than in the Bankruptcy Court. The so-called "findings of fact and conclusion of law" of the Bankruptcy Judge did not pertain to any question before the Bankruptcy Judge and were therefore extraneous, irrelevant, immaterial, and not binding in any way upon either party to this case.

ANSWERS TO APPELLEE'S ARGUMENT

1. **The Federal questions sought to be reviewed were timely raised under the Texas Rules of Civil Procedure and under Texas Common Law.**
2. **The questions asserted by Appellant were passed upon by the Supreme Court of Texas as by its omission.**
3. **The opinion of the Court sought to be reviewed rests squarely on the Federal grounds sought to be reviewed before this Court and may not be supported on any substantial or adequate non-Federal basis.**
4. **A substantial Federal question is raised.**

Appellant will not answer Appellee's argument about the appeal of June 24, 1974, for the reason that it constitutes no part of the record. Even if it did, Rule 415 TRCP (see appendix A of Appellee's Motion) permits dismissal of such appeal and that appeal was dismissed by the Clerk of that Court as "moot" (Appellee's appendix B). Appellant did not pursue that interlocutory appeal for the reason that Appellant did not feel that it would be fair to Appellant, Appellee, or to the Appellate Court to prosecute because the facts of the case had not been properly developed at that time. Appellee could have asked the Appellate Court to hear the appeal anyway and dismiss it with prejudice, however Appellee did not do so and should not be heard to complain at this time. This is the very first time that Appellee has brought up this earlier abandoned appeal during the entire proceeding before the Texas Courts. Such an argument, therefore, is utterly meaningless and an imposition upon your Appellant and this Court.

Regarding the question of fundamental error, Texas law, administering to civilized and enlightened citizens, has always assumed that its citizens know and follow the law and the Courts themselves, at least with respect to fundamental law, has not felt that the basic tenets of the Constitution of the United States and the Amendments thereto have to be continuously pointed out.

Your Appellant is complaining that it was not afforded *due process of law* as required by the Constitution of the United States. Must Appellant use the words "due process of law" to complain that Judge A. P. Allison purported to dissolve the Temporary Restraining Order without a hearing as required by the Texas Rules of Civil Procedure? Must Appellant state the words "due process of law"

when it complains that Judge Allison received evidence in the telephonic hearing without the knowledge of Appellant? Must Appellant use those words when Appellant complains that Judge Allison ordered the Trustee to commence the foreclosure sale prior to the telephonic hearing and ordered the Trustee to sell the property following the telephonic hearing?

Each of the above questions were presented to the lower Court during trial and were submitted to the Court of Appeals of El Paso where the words *due process of law* were specifically used, and to the Supreme Court of the State of Texas, and were ruled upon adversely to Appellant by each of said Courts.

Appellee states that "the error set forth at page 5 of the Jurisdictional Statement" was improperly raised because it was raised for the first time in its reply brief filed in the Court of Civil Appeals contemporaneously with the opening words of Appellant's oral argument. Appellee says that "under Texas procedure, the Appellant's assertion of error in such a manner was not seasonably made". Appellee cites no authority for this astounding statement. The reply brief filed by Appellant, as Appellee says, was accepted by the Court of Civil Appeals and is a part of the record in this case. The points and arguments submitted therein were considered by the Texas Court of Civil Appeals. The Texas Court of Civil Appeals, however, chose not to write on the question presented. This Court knows there is considerable difference between the Appellate Court's refusing to "pass" on certain questions and refusing to "write" on those questions. If the questions are presented to the Appellate Court and it chooses not to write its opinion with respect to those questions, it nevertheless has passed upon them.

THE JUDGMENT MAY NOT BE SUSTAINED UNDER THE DUE PROCESS CLAUSE

The Texas Court of Civil Appeals in its opinion declared *the general common law rule in Texas is that the Court in which suit is first filed acquires dominant jurisdiction to the exclusion of other coordinate Courts and cites the case of Curtis v. Gibbs.* (Citation omitted). That case involves two courts, each with active cases before them involving the same parties and the same facts and each seeking to modify an earlier final judgment. In our situation, the earlier case in the 190th Judicial District Court of Harris County had been *dismissed* at the earliest opportunity and at the time of the order of dissolution of the Temporary Restraining Order by Judge Allison, there was *only one case* in existence anywhere.

The Texas Court of Civil Appeals was simply in error in its declaration of Texas law as applied to this case, and Appellee's argument is therefore not in point.

A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

Judge Allison ordered the commencement of the foreclosure sale *prior to any notice* to Appellant, and ordered the Trustee to complete the sale following the telephone conference.

A state official became involved in a foreclosure proceeding. There was, therefore, "significant state action".

It is *not* the contention of Appellant that the contractual foreclosure remedy utilized by Appellee is unconstitutional. It is the contention of Appellant that when

a state Court enjoins a Trustee and Mortgagee from proceeding with a foreclosure proceeding under that contractual foreclosure remedy, in order to set aside that enjoinment, there must be an adequate notice and hearing as expeditiously and as the ends of *justice* require. Rule 608 TRCP (emphasis added) Here there was no notice of the oral order to the Trustee to commence the sale prior to the telephone conference and there was inadequate notice and inadequate opportunity to be heard during the telephone conference. Evidence, unknown to Appellant, was received by the Court during the telephone conference.

Appellant complied with every state procedural requirement and the Court issuing the Temporary Restraining Order, Judge A.P. Allison, had complete jurisdiction.

For the sake of argument, if Appellee's contention that Judge Allison did not have jurisdiction at the time of the issuance of the Temporary Restraining Order, immediately upon the dismissal of the Harris County case, Judge Allison was the only Court with jurisdiction and his Court thereby acquired "dominant jurisdiction" and his orders were the only valid Court orders, at all times, before any Texas Court.

The Appellee should be considered to have *waived* any objection to the validity of Judge Allison's Temporary Restraining Order by demanding that the Temporary Restraining Order be dissolved. Certainly at that time Appellee did not consider the Temporary Restraining Order to be invalid, but instead sought the order of the Court to commence the sale prior to the hearing and sought the order of the Court dissolving the Temporary Restraining Order and relied upon that Order of dissolution in their foreclosure proceeding.

THE JUDGMENT SHOULD BE REVERSED

Your Appellant says that the judggment of the Texas Court of Civil Appeals and the Supreme Court of Texas is not only incorrect under Texas Law but violates the *due process clause* of the Constitution of the United States.

It must be remembered that Appellant's home office was in Harris County, Texas, 200 miles away from the situs of the land in Bandera County where the Trustee's sale had to take place under Texas Law. If the Harris County Court refused the Temporary Restraining Order that Tuesday morning of June 4, 1974, it would have been totally impossible for the officers and attorneys for FLR Corporation to travel to Bandera, Texas, to attend the foreclosure sale. Upon the Houston Court's postponing consideration of the Temporary Restraining Order until the morning of June 4th, Appellant's only safe procedure was to seek the Court with jurisdiction over the real property involved, the Honorable Judge A.P. Allison of the 198th Judicial District Court of Bandera County, Texas. Because the Court and Clerks in Harris County had closed their offices, a non-suit could not be presented to the Harris County Court until the next morning. Upon Judge Allison's issuance of the Temporary Restraining Order, that case was dismissed at Appellant's earliest opportunity. Appellant did not "forum shop" but instead followed Texas procedure as prescribed by the Texas Rules of Procedure to the letter.

CONCLUSION

This is a case illustrative of the forces of power acting upon the human elements administering Texas procedure.

The Appellee is represented by the largest and most powerful law firm in the United States and is backed by a huge financial institution. Your Appellant is represented by a sole practitioner and this case is its sole asset from which it can make any recovery for the benefit of its many creditors in the Bankruptcy Court and its investors and which can return the property, The Flying L Ranch, to the gorgeous resort community as it was originally intended.

Appellant respectfully urges that this Appeal should be allowed and that upon hearing and full consideration that this Court reverse the judgment of the Supreme Court of Texas.

Respectfully submitted,

SAMUEL INTRATER
BRICK & INTRATER
1025 Vermont Avenue, N.W.
Washington, D.C.
(202) 347-6943

Of Counsel:

WENDELL S. LOOMIS
1012 Esperson Building
808 Travis
Houston, Texas 77002
(713) 225-0761